

# THE CASE THAT STOPPED A COUP? THE RULE OF LAW IN FIJI

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## I INTRODUCTION\*

I appreciate the privilege of addressing you today. As a scholar at Victoria University of Wellington, Professor Quentin-Baxter recognised something that is only becoming fully apparent today. That is the idea, reflected in his own academic work and public service, that it is not only possible, but necessary to bridge the divide that is often imagined between the fields of international and constitutional law. I am also delighted to be giving this lecture because it deals with a subject to which Mrs Alison Quentin-Baxter, as a constitutional and international lawyer, has made a distinguished contribution. That subject is the development of legal institutions and the strengthening of the rule of law in the Pacific. Mrs Quentin-Baxter was Counsel assisting the Fiji Constitution Review Committee that was instrumental in drafting Fiji's multi-racial 1997 Constitution.<sup>1</sup>

My lecture today concerns that Constitution and the events that overtook it. On 29 May 2000, the Commander of the Fiji Military Forces issued a decree abrogating the 1997 Fijian Constitution. Nine months later on 1 March 2001, the Court of Appeal of Fiji held in *Republic of Fiji v Prasad*<sup>2</sup> that the 1997 Constitution remains in force as the supreme law of Fiji. Immediately after the decision, the Prime Minister of the Military installed Interim Civilian Government stated that the nation would be returned to democratic rule under the Constitution. These events, centering upon the decision of the Court of Appeal, are an important landmark in the history of the common law. It is the first time that the leaders of a coup d'état have voluntarily submitted to the jurisdiction of a court only months after a takeover. It is also the first time that a court decision may restore a Constitution, and the democratic system of government created by it.

By contrast, in cases heard several years after a coup, courts in other nations have given legal recognition to an otherwise unlawful usurper. In such a situation, courts have commonly recognised that it is futile to deny the legality of the new regime and have taken the pragmatic course of declaring that a new legal order has been created.<sup>3</sup> The power to declare the old order to be over and that a new order has arisen is an example of the exercise of a supra-constitutional jurisdiction, that is, a jurisdiction that involves the court stepping outside of the legal and constitutional order that created it. According to Lord Reid in *Madzimbamuto v Lardner-Burke*,<sup>4</sup> it is a role that cannot be avoided as a court 'must decide' upon the 'status of a new regime which has usurped power and acquired control of that territory'. He continued:

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<sup>1</sup> See A Quentin-Baxter "Reconciling Individual and Group Rights in Fiji" in *International Legal Challenges for the Twenty-first Century* (Proceedings of a Joint Meeting of the Australian & New Zealand Society of International Law and the American Society of International Law, 26-29 June 2000) 297.

<sup>2</sup> *Republic of Fiji v Prasad* [2001] 2 LRC 743. For commentary on and reactions to the decision, see NW Barber "State Necessity and Revolutionary Legality in Fiji" (2001) 117 LQR 408; JI Edelstein "The Prasad Affidavits: Proof of Facts in Revolutionary Legitimacy Cases" (2002) 24 Sydney Law Review 57; M Fenwick "Case Note: The Republic of Fiji Islands v Prasad" (2001) 5 Newcastle Law Review 112; K Handley "The Constitutional Crisis in Fiji" (2002) 5 Judicial Review 287; M Head "A Victory for Democracy? An Alternative Assessment of Republic of Fiji v Prasad" (2001) 2 Melbourne Journal of International Law 535; R Hughes and C Laksman "Fiji Islands: Failure of Constitutionalism?" (2001) 32 VUWLR 915; BV Lal "Making History, Becoming History: Reflections on the Alleged Failure of the Fiji Constitution" (2001) 5 Newcastle Law Review 82; S Lee "Constitutional Crisis in Paradise: The Fiji Court of Appeal Decision in *Republic of Fiji v Prasad*" (2001) 3 Australian Journal of Asian Law 280; PD Maynard "Trial Observation in Fiji Constitutional Case" (2001) 26 International Legal Practitioner 66; D O'Brien "Fiji's Constitution Restored" (2001) 12 Public Law Review 163; JJ Udit "Courts and Revolution - *Republic of Fiji & The Attorney General v Chandrika Prasad*, Fiji Court of Appeal" (2001) IV(1) The Legal Lali 4; G Williams "David vs Goliath in Fiji" (2001) 26 Alternative Law Journal 146; PW Young "Current Issues: Fiji" (2001) 75 Australian Law Journal 277.

<sup>3</sup> For a survey of the case law, see T Mahmud "Jurisprudence of Successful Treason: Coups d'Etat and Common Law" (1994) 27 Cornell International Law Journal 49.

<sup>4</sup> [1969] 1 AC 645, 724.

It is an historical fact that in many countries – and indeed in many countries which are or have been under British sovereignty – there are now regimes which are universally recognised as lawful but which derive their origins from revolution or coups d'état. The law must take account of that fact. So there may be a question how or at what stage the new regime became lawful.<sup>5</sup>

The decision of the Privy Council in *Madzimbamuto* was unusual in that it held that the Smith regime in Southern Rhodesia was unlawful nearly three years after its usurpation of power.<sup>6</sup> While it was possible in that case, from the safe distance of the United Kingdom, to deny the legality of the new regime, domestic courts have consistently granted the usurper legal recognition. Indeed, prior to the *Prasad* litigation, there had never been a decision by a domestic court denying the stamp of judicial legitimacy to a usurper in control of the apparatus of government. In this, the decision in *Republic of Fiji v Prasad* is unique.

## II BACKGROUND

The Republic of the Fiji Islands is located in the South Pacific and consists of a number of volcanic islands settled some 3,500 years ago by Melanesian and Polynesian peoples. On 10 October 1874, a convention of the High Chiefs of Fiji ceded sovereignty over Fiji to Queen Victoria of the United Kingdom. This brought about enormous changes in the population. In the late nineteenth and early twentieth centuries, the British colonisers brought many thousands of Indians to Fiji to work as indentured labourers in the sugarcane fields. Indians also voluntarily migrated to Fiji in the early part of the twentieth century. Today, Fiji has a population of just over 850,000 people. Approximately 51% of the population consists of Indigenous Fijians, with 44% of the population being Indo-Fijian. The multi-racial nature of Fijian society has given rise to significant tensions between the two major ethnic groups. Joseph Carens has described the 'dominant pattern' between the two groups as 'one of separateness': 'The army is composed overwhelmingly of Fijians, and the civil service predominantly so, while the professions are primarily occupied by Indo-Fijians.'<sup>7</sup>

Fiji achieved independence from the United Kingdom on 10 October 1970, when Queen Elizabeth II promulgated the Fiji Independence Order 1970, and the Fiji Constitution of 1970 came into being. For the next seventeen years, Fiji was a peaceful parliamentary democracy under a Westminster style of government.

As a result of elections held in April 1987, Dr Timoci Bavadra, an Indigenous Fijian, became Prime Minister at the head of Fiji's first majority Indian government, in which the Cabinet was divided almost equally between Indigenous and Indo-Fijians. He was overthrown as a result of a military coup on 14 May 1987 by Lieutenant Colonel Sitiveni Rabuka. The coup led the Governor General to dissolve Parliament and declare vacant the offices of Prime Minister and his Ministers. Dr Bavadra brought proceedings seeking constitutional relief against the actions of the Governor General. A decision of the Supreme Court of Fiji rejected an application to strike out the proceedings, although it did find that certain of the grounds of relief sought were not justiciable.<sup>8</sup> The action was overtaken when a second military coup on 26 September 1987, again led by Rabuka, repealed the 1970 Constitution and declared Fiji to be a republic.

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<sup>5</sup> *Madzimbamuto v Lardner-Burke*, above n 4, 724.

<sup>6</sup> The United Kingdom Parliament had provided in the *Southern Rhodesia Act 1965* (and in the Southern Rhodesia (Constitution) Order 1965) that Southern Rhodesia continued to be part of the Her Majesty's Dominions. This led Lord Reid in *Madzimbamuto v Lardner-Burke* (above n 4, 725) to deny legal recognition because: 'The British Government acting for the lawful Sovereign is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed.'

<sup>7</sup> J Carens *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (OUP, Oxford, 2000) at 207-208.

<sup>8</sup> *Bavadra v Attorney-General* [1987] SPLR 95; [1988] LRC 13.

The second 1987 coup led to the formation of a new government supported by Rabuka. A new constitution drafted by this government was imposed in 1990 with the support of the Bose Levu Vakaturaga, or Great Council of Chiefs. The Council contains every hereditary chief of the various Indigenous Fijian clans and possesses significant moral and political power in Fiji. Under the Fiji Constitution of 1990, a majority of seats in the Parliament were reserved for Indigenous Fijians, as was the position of Prime Minister. Rabuka ultimately became Prime Minister in 1993.

Section 161 of the 1990 Constitution provided for a review of that Constitution within seven years. Unanimous resolutions were passed by both Houses of the Fiji Parliament in 1993 to establish a constitutional review process. The Constitutional Review Commission was established in 1995, and was chaired by Sir Paul Reeves, former Governor-General and Archbishop of New Zealand. The Reeves Commission held extensive public hearings throughout Fiji and received submissions from all political parties and significant interest groups. Its report, 'The Fiji Islands: Towards a United Future', was tabled in Parliament in September 1996. The multi-racial constitution proposed by the report was endorsed by the Great Council of Chiefs. Five parliamentary sub-committees deliberated on the Report over the following 6 months, and a Joint Parliamentary Select Committee published its own conclusions in May 1997.

The second reading of the Constitution Amendment Bill 1997, based on the Report, was moved in the House of Representatives by Prime Minister Rabuka, who described it as 'an expression of confidence and hope in our collective future' and as a multi-racial 'model for other countries and people to follow'.<sup>9</sup> Rabuka also stated that the Bill 'fully acknowledges the special position and needs of the indigenous Fijian and Rotuman communities in Fiji'.<sup>10</sup> In a poignant conclusion, he paid his respects to the late Bavadra, who Prime Ministership he had overthrown a decade before. The Bill was debated in detail and passed by a unanimous vote of the House of Representatives, before being approved by the Senate and assented to by the President on 25 July 1997.

The Constitution Amendment Act 1997 brought about the Fiji Constitution of 1997, which entered into force on 27 July 1998. The 1997 Constitution contains a Preamble in which the people of Fiji committed 'ourselves anew to living in harmony and unity, promoting social justice and the economic and social advancement of all communities, respecting their rights and interests and strengthening our institutions of government.' Chapter 2 sets out a compact in which the people of Fiji recognise that the conduct of government will be based upon certain principles, including recognition that 'the paramountcy of [Indigenous] Fijian interests as a protective principle continues to apply, so as to ensure that the interests of the [Indigenous] Fijian community are not subordinated to the interests of other communities'.<sup>11</sup> This principle must to be understood in the context of the rights set out in the Bill of Rights in Chapter 4, including the 'right to equality before the law' in section 38. Additional protection is provided for Indigenous Fijians by section 185, which entrenches against repeal or amendment certain statutes that safeguard Indigenous rights, including land rights.<sup>12</sup> Section 186 also provides that Parliament must make provision for customary laws and for dispute resolution in accordance with traditional Fijian processes and for granting to the owners of land or of registered customary fishing rights an equitable share of any royalties received by the State.

The Constitution prescribes an electoral system based upon the Australian model of preferential voting.<sup>13</sup> In the House of Representatives, 46 of the 71 seats are communal seats allocated to different

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<sup>9</sup> House of Representatives, *Hansard*, 23 June 1997, 4442, 4444.

<sup>10</sup> *Hansard*, above, 4441.

<sup>11</sup> Section 6(j) 1997 Constitution.

<sup>12</sup> Under section 185, any alteration of the Acts relating to Indigenous rights must be read three times in each House and motions for the second and third readings carried in each House. In addition, the alteration must be supported by at least nine of the 14 members of the Senate appointed on the recommendation of the Great Council of Chiefs.

<sup>13</sup> Section 54 1997 Constitution.

ethnic groups according to their representation in the general population, with the remaining 25 seats being open.<sup>14</sup>

Chapter 15 of the Constitution prescribes the only method for its amendment, section 190 stating that: 'This Constitution may be altered in the way set out in this Chapter and may not be altered in any other way.' Under section 191, the Constitution can be amended by a Bill passed by at least two-thirds of the members of each House of the Fiji Parliament.<sup>15</sup> This is subject to section 192, which provides that the number of seats in the House of Representatives allocated to each ethnic group can only be altered where the change receives a specified level of support from those ethnic representatives.

The first elections held under the 1997 Constitution took place in May 1999. The election was won convincingly by the Peoples Coalition, a collection of parties that gained 54 out of the 71 seats in the House of Representatives. The leader of Peoples Coalition, and head of the multi-racial Fiji Labour Party, Mahendra Chaudhry, became Fiji's first Indo-Fijian Prime Minister. Under section 59 of the Constitution, the House of Representatives was to continue for five years from the date of its first meeting, unless sooner dissolved.

### III THE 2000 COUP

On 19 May 2000, a year into the term of Prime Minister Chaudhry, a group of armed men led by George Speight seized Parliament and took the Prime Minister, many of his Ministers, and members of Parliament hostage. Speight and his followers demanded the abolition of the 1997 Constitution and asserted Indigenous Fijian supremacy. That same day, Speight purported to abrogate the Constitution by issuing the *Fiji Constitution Revocation Decree 2000*.<sup>16</sup> In response, the President of Fiji, Ratu Sir Kamisese Mara, declared a state of emergency. As the security situation worsened, on 27 May the President appointed an acting Prime Minister, Ratu Tevita Momoedonu, Minister for Labour Industrial Relations and Immigration. The acting Prime Minister advised the President to prorogue Parliament and then resigned. Acting on this advice, the President prorogued Parliament for six months.

Two days later on 29 May, and ten days after Speight entered Parliament, the Police Commissioner wrote to the President to advise him that the Fiji Police Force could no longer guarantee the security of the nation. A meeting was held that night between the President and the Commander of the Fiji Military Forces, Commodore Josaia Voreqe Bainimarama. Although the President did not resign, the Commander decided to assume power and impose martial law. After the meeting, the Commodore issued Interim Military Government (IMG) Decree No 1, *Fiji Constitution Revocation Decree 2000*, which stated: 'Notwithstanding the provisions of any law existing ... the Fiji Constitution Amendment Act 1997 is with effect from 29<sup>th</sup> Day of May 2000, wholly removed.'

IMG Decree No 3, *Constitution Abrogation - Interim Military Government and Finance Decree 2000*, was promulgated soon after. It established an Interim Military Government and, under section 5(2), declared that executive authority of the Republic of Fiji was vested in the Commander as the head of the Military Government. The coup attempt by Speight had been quickly followed by another. Unlike Speight, however, the Commander had the military might to enforce his will. The taking of power by the Military was not unlike many other coups around the world. Indeed, the two 1987 coups in Fiji had set such an example not long before.

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<sup>14</sup> Section 51 1997 Constitution.

<sup>15</sup> Under section 191, the changes must gain the support of: (1) at least two-thirds of the members of each House of the Fiji Parliament; or (2) if the Prime Minister certifies that a particular amendment is an urgent measure, then a majority of at least 53 of the 71 members (three-quarters) of the House of Representatives and a majority of the members of the Senate.

<sup>16</sup> Speight issued six decrees between 19 May and 20 June 2000.

Other decrees issued by the Military<sup>17</sup> included IMG Decree No 7, *Fundamental Rights and Freedoms Decree 2000*. This Decree substantially reproduced the Bill of Rights set out in the 1997 Constitution. The Decree even went so far as to provide that the rights set out in this Decree were, like those in the 1997 Constitution,<sup>18</sup> to be interpreted in accordance with international law norms and the 'values that underlie a democratic society based on freedom and equality'.<sup>19</sup> However, the Decree also limited those rights in one important respect. It restated the right to equality, but in section 24(6) of the Decree made this right 'Subject to any law providing for or protecting the enhancement of Fijian or Rotuman interests.'<sup>20</sup> This was designed to grant Indigenous Fijians a predominant position contrary to that achieved by the combination of the compact and equality guarantee of the 1997 Constitution.

On 4 July, as the Commodore continued to negotiate with Speight, IMG Decree No 10, *Interim Civilian Government (Establishment) Decree 2000* was issued under which the Fijian Military established an Interim Civilian Government. IMG Decree No 19, *Interim Civilian Government (Transfer of Executive Authority) Decree 2000* provided for the appointment of an Interim President and that the Interim Civilian Government had the power to make laws for the peace, order and good government of Fiji by means of decrees promulgated by the President on the advice of the Cabinet. Laisenia Qarase was appointed as Interim Prime Minister and received the support of the Great Council of Chiefs.

On 13 July, Qarase presented the Great Council of Chiefs with a document entitled *Blueprint for the Protection of Fijian and Rotuman Rights and Interests, and the Advancement of their Development*, which asserted the 'paramourcy' of Indigenous Fijian interests and called for a new constitution to be drafted that would 'give effect to the collective desire of Fijians that the national leadership positions of Head of State and Head of Government should always be held by them'. In October, Qarase established a constitutional review commission to draft a new constitution based upon such principles. As Brian Opeskin has remarked: 'the Commission's terms of reference appear to presage its final result by requiring recognition of the paramount interests of indigenous Fijians, affirmative action for indigenous Fijians, and so on.'<sup>21</sup>

The final hostages, including Prime Minister Chaudhry, were released by Speight on 14 July, eight weeks after they had been detained. Their release occurred under the Muanikau Accord made between the Commander and Speight. Under the Accord, Speight and his supporters were to surrender their weapons and receive immunity from prosecution. However, it appeared that Speight and some of his supporters had not surrendered their weapons and they were arrested. Speight was taken into custody on 26 July and charged with a number of offences under the Fijian penal code, including treason. Despite his arrest and the release of the hostages, no attempt was made by the Military or its Interim Civilian Government to restore the 1997 Constitution or the Parliament elected in May 1999.

On 18 August, Interim Civilian Government Decree No 22, *Judicature Decree 2000*,<sup>22</sup> was promulgated. It 're-established' the High Court and Court of Appeal of Fiji, but did not require the existing judges to take a new judicial oath. The Decree sought to make the Court of Appeal the final appeal court for Fiji by abolishing the Supreme Court of Fiji.

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<sup>17</sup> The Military issued 11 decrees between 29 May and 5 July 2000.

<sup>18</sup> Section 43(2) 1997 Constitution ('In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.')

<sup>19</sup> Section 24(4) IMG Decree No 7, *Fundamental Rights and Freedoms Decree 2000*.

<sup>20</sup> The right to equality was also limited by section 19(7)(g) of the Decree, which provided that it did not extend to laws that provide 'for the prosecution of unnatural offences or indecent practices'.

<sup>21</sup> B Opeskin "Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries" [2000] Public Law 607, 622.

<sup>22</sup> The Interim Civilian Government issued 30 decrees between 7 July and the end of 2000 and a further four Decrees in 2001 up to 12 January.

#### IV IN THE HIGH COURT OF FIJI: PRASAD V REPUBLIC OF FIJI

On 4 July 2000, the same day that the Interim Civilian Government was created and ten days before the final hostages were released, an action was filed by Chandrika Prasad in the High Court of Fiji in Lautoka against the Republic of Fiji and the Attorney-General of the Interim Civilian Government. Prasad, an Indo-Fijian farmer, had been displaced when he and his family were forced off their land in the wake of the Speight coup attempt. His home had been robbed and badly damaged, his livestock butchered, and his crops destroyed. He was threatened with death. Rebuffed by the police, he turned to the courts.

Prasad did not bring his action in order to restore Prime Minister Chaudhry. In fact, Prasad admitted in his affidavit before the Court of Appeal that he does 'not care for politicians'. He stated that he brought the case because he wanted the international community to be aware of the human rights violations occurring in Fiji and because he believed that an affirmation of the rule of law and the 1997 Constitution might enable him to 'live peacefully in my own home and ... be treated with respect'. According to the Court of Appeal of Fiji, 'Mr Prasad is just an ordinary citizen seeking a return to normality.' In his action, Prasad did not seek damages for his physical suffering, but instead sought a declaration that the 1997 Constitution remains in force and that the elected government of Fiji had not been lawfully dismissed.<sup>23</sup>

I was briefed to represent Prasad with two Fijian lawyers, Anu Patel and Neel Shivam. The matter was heard over one day on 23 August 2000 before a single judge of the High Court, Justice Gates. Justice Gates handed down his decision on 15 November 2000,<sup>24</sup> finding for Prasad. Justice Gates based his decision upon the doctrine of necessity.

There is no reference to the necessity doctrine in the text of the 1997 Constitution, but, as in other constitutional systems,<sup>25</sup> it was seen as being necessarily implied into the instrument as a means of ensuring its preservation. As a result, necessity is not a supra-constitutional doctrine, that is, one that exists outside of a constitutional structure.

Courts have recognised a principle of necessity that dictates that, in times of extreme crisis, emergency action may validly be taken that would otherwise be illegal. Such action, including a declaration of martial law, must be a transient and proportionate response to the crisis. It may be invoked only to uphold the rule of law and the existing legal order, and, therefore, cannot be applied to uphold the legality of a new revolutionary regime. The latter can only be achieved under the doctrine of 'effectiveness', which is examined below. According to FM Brookfield, a leading writer in this field:

the power of a Head of State under a written Constitution extends by implication to executive acts, and also to legislative acts taken temporarily (that is, until confirmed, varied or disallowed by the lawful Legislature) to preserve or restore the Constitution, even though the Constitution itself contains no express warrant for them.<sup>26</sup>

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<sup>23</sup> The Orders sought were as follows: '(1) That the attempted coup of May 19 was unsuccessful. (2) That the declaration of a state of emergency under the doctrine of necessity by the President Ratu Sir Kamisese Mara was unconstitutional. (3) That the revocation of the 1997 Constitution by the decree by the Interim Military Government was unconstitutional. (4) That the 1997 Constitution still remains in force. (5) That the elected government is still a legally constituted government in view of the inability of the interim military government and Speight's group to reach an agreement on governing the country. (6) That the elected government (The People's Coalition) is still the legitimate government. (7) Any relief that the Court considers just and fair.'

<sup>24</sup> *Prasad v Republic of Fiji* [2001] NZAR 21; [2001] 1 LRC 665.

<sup>25</sup> *Attorney-General v Ibrahim* [1964] Cyprus Law Reports 195.

<sup>26</sup> F Brookfield "The Fiji Revolutions of 1987" [1988] New Zealand Law Journal 250, 251.

This construction of the necessity doctrine is consistent with decisions of the Supreme Court of Pakistan,<sup>27</sup> where it has been held that emergency action cannot be taken under the principle of necessity in order to subvert the existing constitutional structure.<sup>28</sup> Hence, the doctrine cannot authorise the abrogation of the existing legal order, only its temporary suspension.

The governing principles of the necessity doctrine, as applied by Justice Gates, were stated by Haynes P in *Mitchell v Director of Public Prosecutions*:<sup>29</sup>

- (i) an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function to the State;
- (ii) there must be no other course of action reasonably available;
- (iii) any such action must be reasonably necessary in the interest of peace, order, and good government; but it must not do more than is necessary or legislate beyond that;
- (iv) it must not impair the just rights of citizens under the Constitution;
- (v) it must not be one the sole effect and intention of which is to consolidate or strengthen the revolution as such.<sup>30</sup>

The necessity doctrine was applied by Justice Gates to find that actions of the President of Fiji and the Commander of the Fijian Military could be regarded as lawful insofar it was designed to resolve the hostage crisis and to uphold the 1997 Constitution. Justice Gates' preparedness to apply the doctrine was based upon his finding that there had been no genuine desire on the part of the Commander to abrogate the 1997 Constitution:

Commodore Bainimarama is clearly no usurper. Having acted as he thought best in a temporary but dire hostage crisis, he handed over power to a civilian caretaker administration. Necessity would permit him to suspend the Constitution just for so long as to allow him to free the hostages and to restore law and order. That concluded his role.

However, the purported abrogation of the Constitution was unlawful:

the doctrine of necessity could come to aid Commodore Bainimarama in resolving the hostage crisis, imposing curfews, maintaining roadblocks and ensuring law and order on the streets. Once the hostage crisis was resolved and all other law and order matters contained if not entirely eradicated, the Constitution, previously temporarily on ice or suspended, would re-emerge as the supreme law demanding his support and that of the military to uphold it and to buttress it against any other usurpers. The doctrine could not be used to give sustenance to a new extra-constitutional regime ... Nor could it provide a valid basis for abrogating the Constitution and replacing it with a Constitutional Review Committee and an Interim Civilian Government. Necessity did not demand any of that.

Justice Gates accordingly made the following declaratory orders:

1. The attempted coup of May 19<sup>th</sup> was unsuccessful.

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<sup>27</sup> *Bhutto v Chief of Army Staff* 1977 PLD SC 657, 723, 728, 753; *Zafar Ali Shah v Pervez Musharraf, Chief Executive of Pakistan (Pakistan Petitions Case)* (2000) 33 Supreme Court Monthly Review 1137, 1160-1161 Irshad Hasan Khan CJ.

<sup>28</sup> See also *Texas v White*, 74 US (7 Wall) 700, 733 (1862) Chase CJ; *Madzimbamuto v Lardner-Burke*, above n 4, 441 Fieldsend AJA; *Mokotso v HM King Moshoesho II* [1989] LRC (Const) 24, 122 Cullinan CJ.

<sup>29</sup> [1986] LRC (Const) 35, 88-89.

<sup>30</sup> See also the doctrine as formulated by Lord Pearce of the Privy Council in *Madzimbamuto v Lardner-Burke*, (above n 4, 732): "I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognised as valid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful (1961) Constitution, and (c) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign".

2. The declaration of the State of Emergency by the President Ratu Sir Kamisese Mara in the circumstances then facing the nation, though not strictly proclaimed within the terms of the Constitution, is hereby granted validity *ab initio* under the doctrine of necessity.
3. The revocation of the 1997 Constitution was not made within the doctrine of necessity and such revocation was unconstitutional and of no effect. The 1997 Constitution is the supreme and extant law of Fiji today.
4. The Parliament of Fiji, consisting of the President, the Senate, and the House of Representatives, is still in being. Its incumbents on and prior to 19 May 2000 still hold office, that is Ratu Sir Kamisese Mara, who had stepped aside, and who remains President as originally appointed by the Bose Levu Vakaturaga (Great Council of Chiefs); the Senators are still Members of the Senate; the elected Members of Parliament are still Members of the House of Representatives. The status quo is restored. Parliament should be summoned by the President at his discretion but as soon as practicable.
5. Meanwhile owing to uncertainty over the status of the Government, it will remain for the President to appoint as soon as possible as Prime Minister, the member of the House of Representatives who in the President's opinion can form a government that has the confidence of the House of Representatives pursuant to Sections 47 and 98 of the Constitution, and that government shall be the government of Fiji.

In light of these orders, Justice Gates stated that 'the military is invited and recommended by the court to ensure a smooth and amicable hand over of Government to that which will soon be chosen by the incoming Prime Minister'. He also suggested that, as provided for in section 99 of the 1997 Constitution, a multi-party Cabinet, also known as a Government of National Unity, might be formed by the Parliament.

## V IN THE COURT OF APPEAL OF FIJI: REPUBLIC OF FIJI V PRASAD

There was little to suggest that the decision of Justice Gates would affect political developments in Fiji. Given that the Military had already sought to abrogate the 1997 Constitution, why would it or its Interim Civilian Government obey a decision of a court of law? Indeed, no steps were taken to recall Parliament. Nevertheless, the proceedings took a decisive turn after the High Court decision when, instead of ignoring the orders of Justice Gates, the Interim Civilian Government decided to appeal to the Court of Appeal of Fiji<sup>31</sup> and to submit to the jurisdiction of that Court.<sup>32</sup> It was one thing to abrogate the Constitution, but it proved to be another thing entirely to deny the force of a decision of a respected judge, particularly when it was strongly and unequivocally backed by the international community. Even after the coup, respect for the rule of law and the judiciary prevailed as a fundamental principle of Fijian political culture. Certainly, a decision in favour of the Interim Civilian Government by the Court of Appeal would also have greatly assisted its aim of being seen domestically and internationally as the legitimate government of Fiji.

On 17 January 2001, a single judge of the Court of Appeal granted the parties leave to produce new evidence. Amidst tight security, the appeal itself was heard by a five judge bench over four days from 19 to 22 February 2001.<sup>33</sup> The Prasad legal team was joined for the hearing by Geoffrey Robertson QC. The hearing was televised by Fiji TV.<sup>34</sup> The Court comprised The Rt Hon Sir Maurice Casey, Presiding

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<sup>31</sup> The appeal was lodged on 17 November 2000, two days after the decision by Justice Gates.

<sup>32</sup> As the Court of Appeal noted in its decision: 'To its credit, the Interim Civilian Government in this case has adopted a very responsible stance, as stated by Mr Blake [counsel for the Appellants] at the end of the hearing. He said that in the event of the 1997 Constitution being upheld by the Courts, it would use its best endeavours to promote a return to constitutional legality.'

<sup>33</sup> The submissions of counsel for Prasad in the Court of Appeal are published as G Robertson, G Williams, Anu Patel and Neel Shivam "Republic of Fiji v Prasad: Respondent's Brief" (2001) 2 Melbourne Journal of International Law 151 [*Respondent's Brief*].

<sup>34</sup> On the first day of the hearing, an interlocutory motion was made by Fiji TV seeking permission to televise the proceedings. The motion was granted, subject to conditions, and the hearing was fully televised.

Judge and The Hon Sir Ian Barker, The Hon Sir Mari Kapi, The Hon Mr Justice Gordon Ward and The Hon Mr Justice Kenneth Handley, Justices of Appeal. Each judge had been appointed to the Court of Appeal prior to the events of 2000 and had taken his oath of office as set out in the 1997 Constitution.<sup>35</sup> Even though this was a domestic Fijian court, as is common in Fiji and the region each judge was based outside of Fiji and would come to Fiji to sit as a member of the Court as the need arose. Two members, including the Presiding Judge, were from New Zealand, with one judge each from Australia, Papua New Guinea and Tonga.

The Court of Appeal handed down its decision on 1 March 2001. It issued a unanimous judgment in which it dismissed the appeal and made the following declarations in lieu of those made by Justice Gates:

1. The 1997 Constitution remains the supreme law of the Republic of The Fiji Islands and has not been abrogated.
2. Parliament has not been dissolved. It was prorogued on 27 May 2000 for six months.
3. The office of the President under the 1997 Constitution became vacant when the resignation of Ratu Sir Kamisese Mara took effect on 15 December 2000. In accordance with section 88 of that Constitution, the Vice-President may perform the functions of the President until 15 March 2001 unless a President is sooner appointed under section 90.

Like Justice Gates, the members of the Court of Appeal found that the 1997 Constitution remained in force, and thus that the attempt to abrogate the Constitution was ineffective and unlawful. However, the Court of Appeal reached this result by different reasoning to that of Justice Gates. Fresh evidence put before the Court of Appeal suggested that Justice Gates was incorrect in finding that 'Commodore Bainimarama is clearly no usurper'. The Court of Appeal held that the evidence established that the Commodore did seek to assert the legitimacy of the new legal order created by him, at the expense of the 1997 Constitution.

The Commodore stated in his affidavits that the abrogation of the Constitution was necessary because 'the 1997 Constitution was widely regarded as inadequately protecting indigenous rights, insufficiently protecting Fijian land and endorsing an electoral system having bizarre and unexpected results'. Exploitation of these 'perceptions' enabled the 'destabilisation of Fiji society, loss of life, destruction of property and such other fundamentally repugnant actions of the Speight group' and other 'very unsophisticated persons'. After examining the terms of the 1997 Constitution, the Court concluded that such 'perceptions' were incorrect as the Constitution did in fact entrench specific protection for Indigenous interests. It also found that the electoral system had not, in May 1999, operated to the detriment of Indigenous Fijian political aspirations, and that the Peoples Coalition Government would have been elected even if the system had not been according to the Australian preferential ballot but on the basis of a 'first past the post' or proportional system of voting. The Court concluded: 'Whichever system had been used, the voting figures would have made the FLP [Fiji Labour Party] the largest individual party by a substantial margin.'<sup>36</sup>

Despite finding that the Commodore had intended to usurp power, the Court of Appeal could nevertheless have applied the necessity doctrine. It might have 'read down' the actions of the Commodore to their proper lawful scope as defined by that doctrine. For example, the purported abrogation of the 1997 Constitution might have been given effect merely as a temporary suspension for the duration of the hostage crisis. However, instead of adopting this course, the Court determined the matter by applying the effectiveness doctrine.

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<sup>35</sup> The oath is required by section 135 of the 1997 Constitution and is set out in Part D of the Schedule. It requires, in part, that the maker state 'I will in all things uphold the Constitution'.

<sup>36</sup> The Court also found: 'Analysis of the results of that election shows most alternative votes were cast on ethnic lines but the majority of Fijians preferred to give that vote to the Fijian parties committed to the Peoples Coalition rather than to the [opposition] SVT [Soqosoqo ni Vakavulewa ni Taukei]. There is little evidence to support the contention that the voters were confused by the system.'

Under the common law doctrine of ‘effectiveness’, a court exercises a supra-constitutional jurisdiction in determining whether a revolution ought to be given lawful recognition. The onus to prove that the new regime is ‘effective’ lies with the usurper.<sup>37</sup> One test for determining effectiveness was set out by Cullinan CJ of the High Court of Lesotho in *Mokotso v HM King Moshoeshow II*.<sup>38</sup>

A court may hold a revolutionary government to be lawful, and its acts to have been legitimated ab initio, where it is satisfied that (a) the government is firmly established, there being no other government in opposition thereto; and (b) the government’s administration is effective, in that the majority of the people are behaving, by and large, in conformity therewith.

In the earlier decision of *Mitchell v Director of Public Prosecutions*,<sup>39</sup> Haynes P of the Court of Appeal of Grenada, included two other elements:

(c) such conformity and obedience [must be] due to popular acceptance and support and ... not mere tacit submission to coercion or fear of force; and (d) it must not appear that the regime was oppressive and undemocratic.

These additional elements proved controversial in adding a further normative component to the test. They were rejected in *Mokotso* because ‘Throughout the course of history there have been regimes, indeed dynasties, holding sway for many years, indeed centuries, whose rule could not be said by any manner of means to be popular and could even be described as oppressive: but who is there to say that a new legal order was not created with their coming and going?’<sup>40</sup> The Court of Appeal of Lesotho reached the same conclusion in its subsequent decision in *Makenete v Lekhanya*.<sup>41</sup>

The Court of Appeal of Fiji found that the formulation of the effectiveness test in *Mokotso* was ‘too narrowly expressed’. It was prepared to accept element (c) of the *Mitchell* test, but doubted the correctness of (d). While the Court recognised ‘the modern shift towards insistence on basic human rights in a raft of international treaties and, more importantly for present purposes, the 1997 Fiji Constitution’, it was not prepared to further extend the effectiveness test by adding a new criterion urged on behalf of Prasad, namely, whether the new regime acknowledges basic human rights as evidenced by international obligations assumed by the nation.<sup>42</sup> Nevertheless, the decision to include the question of popular support by (or the acquiescence of) the people for the new regime introduced a very significant normative element into the test.<sup>43</sup> This element is an important extension to the *Mokotso* requirement that a ‘majority of the people are behaving, by and large, in conformity’ with the dictates of the regime. Where adopted by other courts, it will be extremely difficult for a tyrannical regime that violates basic human rights to gain judicial recognition. The Court of Appeal formulated the effectiveness test and relevant principles under the common law of Fiji as follows:

- (a) The burden of proof of efficacy lies on the de facto government seeking to establish that it is firmly in control of the country with the agreement (tacit or express) of the population as a whole.
- (b) Such proof must be to a high civil standard because of the importance and seriousness of the claim.

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<sup>37</sup> *Mokotso v HM King Moshoeshow*, above n 28, 132 Cullinan CJ (‘the burden of proof of legitimacy must always rest upon the new regime. No presumption of regularity can operate in the regime’s favour: indeed there must be a presumption of irregularity.’). See also *Mitchell v Director of Public Prosecutions*, above n 29, 72 Haynes P; *Makenete v Lekhanya* [1993] LRC 13, 65 Ackerman JA.

<sup>38</sup> Above n 28, 133.

<sup>39</sup> Above n 29, 72.

<sup>40</sup> *Mokotso v HM King Moshoeshow*, above n 28, 130.

<sup>41</sup> Above n 37, 55 Ackerman JA. See also F Brookfield *Waitangi & Indigenous Rights: Revolution, Law and Legitimation* (AUP, Auckland, 1999) 28.

<sup>42</sup> *Respondent’s Brief*, above, 151.

<sup>43</sup> See also *Uganda v Commissioner of Prisons* [1966] EA 514, 539 where Sir Udo Udoma CJ of the High Court of Uganda found that the new regime had been ‘accepted by the people’.

- (c) The overthrow of the Constitution must be successful in the sense that the de facto government is established administratively and there is no rival government.
- (d) In considering whether a rival government exists, the enquiry is not limited to a rival wishing to eliminate the de facto government by force of arms. It is relevant in this case that the elected government is willing to resume power, should the Constitution be affirmed.
- (e) The people must be proved to be behaving in conformity with the dictates of the de facto government. In this context, it is relevant to note that a de facto government (as occurred here) frequently re-affirms many of the laws of the previous constitutional government (eg criminal, commercial and family laws) so that the population would notice little difference in many aspects of daily life between the two regimes. It is usually electoral rights and personal freedoms that are targeted. As one of the deponents said, civil servants such as tax and land titles officials worked normally throughout the coup and its aftermath. Their functions were established and needed no ministerial direction. We derive little proof of acquiescence from facts of that nature.
- (f) Such conformity and obedience to the new regime by the populace as can be proved by the de facto government must stem from popular acceptance and support as distinct from tacit submission to coercion or fear of force.
- (g) The length of time in which the de facto government has been in control is relevant. Obviously, the longer the time, the greater the likelihood of acceptance.
- (h) Elections are powerful evidence of efficacy. It follows that a regime where the people have no elected representatives in government and no right to vote is less likely to establish acquiescence.
- (i) Efficacy is to be assessed at the time of the hearing by the Court making the decision.

On the evidence before it, the Court held that the effectiveness test was not satisfied, and the onus upon the Appellants not discharged, for two reasons. First, there was a rival government striving for power. Affidavits were filed by former Prime Minister Chaudhry and by members of his Cabinet that claimed that the Peoples Coalition was 'ready and willing' to resume office under the 1997 Constitution. Two proceedings had also been instituted by members of the Peoples Coalition challenging the abrogation of the 1997 Constitution. The Court found: 'This is evidence that demonstrates that there is a rival government seeking through the Courts to assert its authority to govern.'

Second, although the Appellants were able to demonstrate the continuing operation of the administration of government throughout the attempted coup and its aftermath, this was insufficient to prove popular acceptance and support for the Interim Civilian Government. The Court found that 'passive compliance is hardly a persuasive indication of true acquiescence in a government which has been in power for only about seven months and severely restricts public protest'. Furthermore, five uncontested volumes of affidavits were filed on behalf of Prasad that showed that, although the Fijian people had not expressed their anger and frustration at the coup through violence, they had made their opposition clear in many forms, such as through their churches, women's groups, an alliance of union and employer organisations and non-violent days of protest. From this, the Court concluded: 'This evidence suggests that a significant proportion of the people of Fiji believe that the 1997 Constitution embodies and protects the ideals and aspirations of the different ethnic groups in Fiji. The material also indicates a widespread belief that there was no proper justification for its abrogation.'

## VI NECESSITY AND EFFECTIVENESS

### A *Necessity versus Effectiveness*

The decisions at first instance and on appeal in the *Prasad* litigation demonstrate that courts have two distinct analytical approaches, namely the doctrines of necessity and effectiveness, available to them when called upon to rule on the lawfulness of a seizure of power by a usurper. Unlike the effectiveness doctrine, necessity is not a supra-constitutional concept as it can be reconciled with

existing constitutional arrangements. Consequently, where necessity can be applied, it is the preferable approach as it is the most consistent with the rule of law.

The argument for applying the necessity approach instead of effectiveness can be made in a strong and weak form. The strong form argument suggests that effectiveness can never be applied by a judge. In its weak form the argument suggests that a judge ought not to resort to effectiveness except in very limited circumstances.

The strong form argument suggests that a court is bound to apply necessity and is precluded from having recourse to the effectiveness doctrine, even where it is apparent to a court that a constitutional structure has been totally displaced by a new regime. This argument relies upon the notion that a court created by a constitution lacks the jurisdiction to determine the legality of that constitution, or at least to do otherwise than to assume its ongoing effect. This is a manifestation of the 'elementary rule of constitutional law which has been expressed metaphorically by saying that a stream cannot rise higher than its source', as applied by the High Court of Australia in the *Communist Party Case*<sup>44</sup> to support the conclusion that Parliament cannot be the judge of its own constitutional power.

This strong form argument against the use of the effectiveness doctrine was accepted in the dissenting positions of Lord Pearce of the Privy Council<sup>45</sup> and Fieldsend AJA of the High Court of Southern Rhodesia in *Madzimbamuto v Lardner-Burke*.<sup>46</sup> Fieldsend AJA found that: 'The law to be administered by a municipal court is ... determined solely by the set of norms prescribed by the legal order upon which the court considering the case is founded'. He also stated:

A court created by a written constitution can have no independent existence apart from that constitution; it does not receive its powers from the common law and declare what its own powers are; it is not a creature of Frankenstein which once created can turn and destroy its maker.<sup>47</sup>

This argument is supported by decisions of the Supreme Court of Pakistan. In 1958, the Supreme Court in *State v Dosso*<sup>48</sup> upheld the legality of President Iskander Mirza's actions in seizing power and abrogating the Constitution. The Court did so only days after the coup by applying the rule that 'the essential condition to determine whether a Constitution has been annulled is the efficacy of the change'.<sup>49</sup> President Mirza only held power from 7 to 24 October 1958 and was overthrown the day after the Court decision that declared his rule effective. In later decisions, the Supreme Court has viewed *Dosso* as an egregious error that set Pakistan on a path to military dictatorship. In 1972, the Supreme Court in *Jilani v Government of the Punjab*<sup>50</sup> overruled *Dosso*.<sup>51</sup> Hamoodur Rahman CJ found that the result in *Dosso* 'was, to say the least, premature',<sup>52</sup> while Yaqub Ali J stated, quoting a commentator, that as a result of the decision:

a perfectly good country was made into a laughing stock. A country which came into being with a written Constitution providing for a parliamentary form of Government with distribution of State power between the

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<sup>44</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 Fullagar J.

<sup>45</sup> [1969] 1 AC 645, 732.

<sup>46</sup> Above n 4, 432.

<sup>47</sup> *Madzimbamuto v Lardner-Burke*, above n 4, 430. See also *Luther v Borden*, 48 US (7 How) 1, 40 Taney CJ (1849) ('Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived.').

<sup>48</sup> 1958 PLD SC 533.

<sup>49</sup> *State v Dosso*, above n 48, 539. It seems that it did so without 'the question of the validity of the abrogation of the Constitution ... [being] directly put in issue' (*Jilani v Government of the Punjab* 1972 PLD SC 139, 162 Hamoodur Rahman CJ).

<sup>50</sup> Above n 49.

<sup>51</sup> The decision to overrule *Dosso* was affirmed in *Bhutto v Chief of Army Staff*, above n 27, 657.

<sup>52</sup> *Jilani v Government of the Punjab*, above n 49, 177.

Executive, Legislature, and the Judiciary, was soon converted into an autocracy and eventually degenerated into military dictatorship.<sup>53</sup>

In *Jilani*,<sup>54</sup> and subsequently in *Bhutto v Chief of Army Staff*,<sup>55</sup> the Supreme Court held that the powers of a court are limited to those conferred by the necessity doctrine.<sup>56</sup> It held that a court could not apply the effectiveness doctrine in order to recognise an otherwise unlawful revolution because to do so would extend the powers of the court outside the constitutional structure and beyond their lawful limits.

The strong form argument against the use of the effectiveness doctrine was made on behalf of Prasad before the Court of Appeal of Fiji. The powers and functions of the Court of Appeal of Fiji are created by s 117 of the 1997 Constitution,<sup>57</sup> and the judges of the Court confirmed during the hearing of the matter that they had been appointed under those arrangements and at a time preceding the coup. Accordingly, it was argued, so long as the Court remains the Court of Appeal as established by the 1997 Constitution, it lacks the power to declare other than that the Constitution remains in force. If the usurping regime had wished to receive judicial support, it would have been required to take the extra step of removing the judges of the court and re-establishing the institution with new, more pliable, members. This argument was rejected by the Court, which found that it was not only 'appropriate for us to consider' the effectiveness doctrine, but 'that it is our duty as Judges of Fiji to do so'.

There is also a weaker form, normative argument against the use of the effectiveness doctrine. The dangers of too readily having resort to the doctrine are obvious. It enables unlawful action by a coup leader to gain the legal reward of judicial recognition. The legitimisation of one unlawful usurper can quickly be followed by an application to uphold another. Even if the legal recognition provided to a coup by a court decision does not in fact encourage further coup action, it can place a court in the embarrassing and difficult position of repeatedly anointing a series of successor regimes. For example, in 1989, Cullinan CJ in *Mokotso v HM King Moshoeshow II*<sup>58</sup> found that a new lawful regime had been created in Lesotho as a result of a 1986 coup by the Paramilitary Forces. In 1993, Ackerman JA in *Makenete v Lekhanya*<sup>59</sup> then found himself in the position of recognising as lawful another coup that had taken place in Lesotho in 1990, again by the Paramilitary Forces, only one year after the decision in *Mokotso*.

Such normative factors were relevant in the *Prasad* litigation. Fiji had already experienced two coups in 1987, and the 1997 Constitution represented a genuine attempt to accommodate the aspirations of the different sections of Fiji's multi-racial community. The 1997 Constitution had been enacted with the unanimous support of the Indigenous controlled Parliament, yet was purportedly abrogated before even one full electoral cycle could be completed. In such a climate, one coup might be readily followed by another as different groups sought to attain political power through violence and the support of the military, rather than through the ballot box.

### **B Kelsen On Effectiveness**

The effectiveness doctrine as first applied in *Dosso* was informed by the writings of legal theorist Hans Kelsen. Reference has often made to Kelsen's writings in subsequent decisions that have analysed

<sup>53</sup> *Jilani v Government of the Punjab*, above n 49, 219.

<sup>54</sup> Above n 49, 179 Hamoodur Rahman CJ.

<sup>55</sup> Above n 27, 692 Anwarul Haq CJ.

<sup>56</sup> The doctrine was, however, arguably stretched too far in *Zafar Ali Shah v Pervez Musharraf*, above n 27, when it was applied by the Supreme Court of Pakistan to permit amendment of the Constitution.

<sup>57</sup> Section 117(1) provides: 'The judicial power of the State vests in the High Court, the Court of Appeal and the Supreme Court and in such other courts as are created by law.'

<sup>58</sup> Above n 28, 24.

<sup>59</sup> Above n 37, 13.

and applied the doctrine.<sup>60</sup> In *General Theory of Law and State*,<sup>61</sup> Kelsen portrayed the legal order of a nation as a pyramid of norms derived (through successive levels of derivation) from the norm-creating powers conferred by the Constitution. The Constitution itself derives its validity from any earlier constitutional arrangements pursuant to which it was adopted, and ultimately from a *Grundnorm* or 'basic norm' embodying the axiomatic assumption that the legal order is to be obeyed. Kelsen argued in *Pure Theory of Law*<sup>62</sup> that a legal system is based upon the presupposition or basic norm that 'One ought to behave according to the actually established and effective constitution.' Hence, where there has been a revolution or other event that has overthrown the existing constitution and put another in its place, this presupposition may allow the new constitution to become recognised as lawful.

While Kelsen's writings were applied in *Dosso*, they were rejected as a guide in the subsequent Pakistan Supreme Court decision in *Jilani*. Similarly, in *Bhutto* the Court criticised reliance upon Kelsen's approach as confusing 'is' and 'ought'.<sup>63</sup> In any event, Kelsen did not view his theoretical insights as establishing a morality that ought to be followed by judges.<sup>64</sup> After analysing the case law, Cyrus Das, now a Justice of the Supreme Court of Malaysia, concluded:<sup>65</sup>

Kelsen's theory has an unacceptable face to it. It endorses unconstitutional behaviour and legalises the actions of usurpers and mutineers. Before long it was rejected in some jurisdictions ... [which] it is submitted ... had rightly given preference to the necessity doctrine over Kelsen's thesis. It [the 'necessity' doctrine] reflects a more discerning approach to the illegal state of affairs produced by the unconstitutional behaviour of a military dictator. It enables the court to recognise only those acts necessary for the maintenance of law and order and discard actions taken in promotion of the rebellion. Lastly, it enables the judges to remain true to their oath.

The Court of Appeal of Fiji also criticised judicial reliance upon the works of Kelsen in the construction of the effectiveness doctrine, finding that 'Some seem over-influenced by the writings of the Austrian jurist Hans Kelsen, whose theories on one view, might too readily reward a usurper.' Otherwise, the Court stated that it would 'resist the temptation to discuss the theoretical basis for exercising this supra-constitutional jurisdiction'.

### C When Should The Effectiveness Doctrine Be Applied?

The strong form argument against the use of the effectiveness doctrine has not been accepted in a number of cases in which a court has recognised the creation of a new legal order. The argument is also inconsistent with the finding of Lord Reid in *Madzimbamuto v Lardner-Burke*,<sup>66</sup> quoted by the Court of Appeal of Fiji, that a court 'must decide' upon the 'status of a new regime which has usurped power and acquired control of that territory'.<sup>67</sup> However, the cases in which the effectiveness doctrine has been applied are very narrow. They suggest, consistent with the weaker form, normative argument, that a court ought only to have recourse to effectiveness in two limited circumstances, and even then as a matter of judicial 'last resort'.

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<sup>60</sup> See, for example, *Uganda v Commissioner of Prisons*, above n 43.

<sup>61</sup> (1945).

<sup>62</sup> (1967) 212.

<sup>63</sup> *Bhutto v Chief of Army Staff*, above n 27, 721.

<sup>64</sup> *Jilani v Government of the Punjab*, above n 49, 179 Hamoodur Rahman CJ; F Brookfield "The Courts, Kelsen and the Rhodesian Revolution" (1969) *University of Toronto Law Journal* 326, 342-344; F Brookfield, *Waitangi & Indigenous Rights: Revolution, Law and Legitimation*, above n 41, 25 ('For Kelsen it is not the judge but the jurist or legal scientist who presupposes the basic norm and who, when a new legal order replaces it by becoming by and large effective in its stead, will presuppose the basic norm of the new legal order').

<sup>65</sup> C Das *Governments and Crisis Powers* (1996) 38-39.

<sup>66</sup> Above n 4.

<sup>67</sup> Above n 4, 724.

First, a court might apply a supra-constitutional jurisdiction in the form of the effectiveness doctrine where it is futile to do otherwise. A court may have no choice as a matter of historical inevitability but to recognise, in hindsight, that a new regime was created by an earlier revolutionary act. In such a case, a court is faced with what actually 'is', as opposed to what 'ought' to be. In Fiji in 2001, this was the case with regard to the effectiveness of the second coup of 1987, but not with regard to the coup of 2000. In the *Prasad* litigation, the High Court and Court of Appeal were not placed in the passive role of observers of an historical shift in the *Grundnorm* of Fiji. They were cast in the centre of an unfolding drama as important actors, and were asked by the coup leaders to recognise a new regime so as to actually lead to a shift in the basic norm of the nation. In such circumstances, the Court reached the only decision that was consistent with its proper constitutional role by rejecting the claim for recognition.

Second, a court might apply the effectiveness doctrine where the overthrow of the old legal order can be seen as part of a 'glorious revolution', such as where a tyrant or repressive regime with no concern for the basic human rights of its citizens is overthrown. For example, Cullinan CJ quoted in *Mokotso v HM King Moshoesho II*<sup>68</sup> a description of the prior regime in Lesotho as being characterised by 'corruption, misappropriation of funds, bloodshed, secret murders made and perpetrated by secret murder squads (Koeeko), illegal arrests and prison detentions as well as general mass suffering'. The Lesotho revolution that overthrew that regime was 'greeted with jubilation by the people in the streets' and apparently was also 'internationally popular'.<sup>69</sup> By contrast, the coup in Fiji in 2000 sought to overthrow a democratically elected Parliament and widely supported Constitution, and was thus not a 'glorious revolution'.

## VII CONCLUSION

The decisions of the High Court and Court of Appeal of Fiji demonstrate that the judiciary can play an important role in maintaining the rule of law even in the immediate period after a coup. The decisions of these Courts are unique in that they represent the only time that a domestic court has pronounced a coup illegal and the abrogation of a nation's constitution legally ineffective. Perhaps even more remarkable was that, immediately after this decision, the Prime Minister of the Interim Civilian Government, Qarase, announced that the nation would be returned to democratic rule under the 1997 Constitution. His government then resigned.

However, Parliament was not recalled. Instead, it was dissolved by the President who called a general election under the 1997 Constitution and re-appointed the Interim Civilian Government as a caretaker administration. The general election held from 25 August to 5 September 2001 returned a coalition government led by Qarase. In the final result, his party, the Soqosoqo Duavata ni Lewenivanua (SDL) won 32 of the 71 seats, with the Fiji Labour Party led by Chaudhry winning 27 seats. While disputes have arisen in Fiji in the aftermath of the poll, it is a positive step forward and an affirmation of the rule of law that they have been resolved through the courts. Since the return to democratic rule, the Supreme Court of Fiji has been reconstituted<sup>70</sup> and has handed down decisions on the composition of both the Senate<sup>71</sup> and Cabinet<sup>72</sup> of Fiji.

In the longer term, the Court of Appeal decision in *Republic of Fiji v Prasad* may act as a disincentive to aspiring coup leaders in Fiji and thus act to break the cycle of coups in that nation. It may also have an impact in other parts of the world, where coup leaders may be forced to contemplate not only

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<sup>68</sup> Above n 28, 167. See also *Zafar Ali Shah v Pervez Musharraf*, above n 27, 1158-1159 Irshad Hasan Khan CJ.

<sup>69</sup> *Mokotso v HM King Moshoesho*, above n 28, 167.

<sup>70</sup> See, for details of the sitting to mark the reconstitution of the Supreme Court, PW Young "Current Issues: Fiji Constitution" (2003) 77 *Australian Law Journal* 555.

<sup>71</sup> *In re the Constitution, Reference by the President* [2002] FJSC 1.

<sup>72</sup> *Qarase v Chaudhry* [2003] FJSC 1. A further matter has been referred to the Supreme Court of Fiji by the President of Fiji on how the composition of Cabinet should be determined as between the eligible parties.

overthrowing a government, but also courts armed with the precedent of *Republic of Fiji v Prasad*. This may prove difficult where the courts, as in Fiji, hold the respect and confidence of the people.

Although the events in Fiji represent a series of firsts, the court decisions there might be applied elsewhere. The critical factors in Fiji of a general respect for the rule of law in a small nation economically dependent upon trade and tourism<sup>73</sup> is a familiar mix. It suggests that international pressure for a restoration of democracy may in some cases be effectively focussed upon seeking an assurance that the coup leadership will honour any decision of that nation's domestic courts on the legality of the coup. In such a case, even someone in the position of a farmer such as Prasad may not be totally powerless, but might, through the courts, play a role in the ongoing political and legal development of the nation.

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<sup>73</sup> The Fijian economy is heavily dependent upon tourism and its exports of sugar and garments. Its major trading partners are Australia and New Zealand. Both nations strongly argued for a restoration of democracy in Fiji and the restoration of the 1997 Constitution. They also supported the outcomes in the High Court and Court of Appeal in the *Prasad* litigation.